



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

October 20, 2004

Ms. Pamela Smith  
Assistant General Counsel  
Texas Department of Public Safety  
P.O. Box 4087  
Austin, Texas 78773-0001

OR2004-8936

Dear Ms. Smith:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 211229.

The Texas Department of Public Safety (the "department") received a request for information concerning the death of Jamie Earl Whitt while incarcerated in the Stephens County Jail. You state that the department will make the preliminary autopsy report available to the requestor. You also state that the department does not possess records responsive to portions of the request. A governmental body has a duty to make a good faith effort to relate a request for information to information that the governmental body holds. Open Records Decision No. 561 (1990). However, the Public Information Act (the "Act") generally does not require a governmental body to obtain information not in its possession or create new information in response to an open records request. *See* Open Records Decision Nos. 599 (1992), 534 (1989). You claim that the submitted records are excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and reviewed the submitted representative sample of information.<sup>1</sup> We have also considered

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<sup>1</sup> We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

comments submitted by the requestor. *See* Gov't Code § 552.304 (providing that member of public may submit comments stating why information should or should not be released).

As a preliminary matter, the requestor contends that the department failed to comply with section 552.301(b) of the Government Code in requesting a ruling from this office. Section 552.301(b) requires a governmental body to submit its request for a decision not later than the tenth business day after the date of receiving the written request for information. Gov't Code § 552.301(b). The requestor and the department agree that the department received the written request on August 2, 2004. *See id.* § 552.301(c) (written request includes request sent to governmental body's officer for public information, or officer's designee, by electronic mail or facsimile transmission). Thus, the department was required to submit its request for a decision no later than August 16, 2004. The requestor informs us that the copy of the department's request for a decision that was sent to the requestor bears postage dated August 17. *See id.* § 552.301(d) (governmental body must provide requestor with copy of governmental body's written communication to attorney general asking for decision). The requestor therefore contends that the department has waived section 552.103 as an exception to disclosure. *See* Gov't Code § 552.302 (governmental body's failure to comply with section 552.301 results in legal presumption that the requested information is public and must be released, unless there is a compelling reason to withhold the information). We note that the department hand-delivered its request for a decision on August 16, 2004, and we received it on that date. We therefore find that the department's request for a decision was in fact timely submitted. Accordingly, we determine that the department has fully complied with section 552.301 in requesting a decision from this office.

Next, we note that a portion of the submitted information is subject to section 552.022 of the Government Code. Section 552.022 of the Government Code, which provides in relevant part:

the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

- (1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). The submitted documents include a questionable death investigation completed by the Texas Ranger Division. We determine that this information, which we have marked, constitutes a completed investigation made by a governmental body and is therefore subject to section 552.022(a)(1). Accordingly, as prescribed by section 552.022, the department must release the completed investigation unless it is confidential under other law. Section 552.103 of the Government Code is a discretionary exception to disclosure that protects the governmental body's interests and is therefore not

other law that makes information expressly confidential for purposes of section 552.022(a). *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Thus, the department may not withhold the completed investigation at issue pursuant to section 552.103 of the Government Code. Because you have raised no other exceptions to disclosure for this information, we determine the department must release the completed investigation to the requestor.

We next consider your claim under section 552.103 with respect to the remaining representative sample information. Section 552.103 of the Government Code provides as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

....

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). A governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation was pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

To establish that litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an

attorney for a potential opposing party.<sup>2</sup> Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be “realistically contemplated”). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982). Further, the fact that a potential opposing party has hired an attorney who makes a request for information does not establish that litigation is reasonably anticipated. Open Records Decision No. 361 (1983).

The District Attorney for Stephens County has informed the department that Stephens County (the “county”) anticipates litigation related to the death of the individual named in the request. You have not indicated, however, that the department would be a party to such potential litigation. Thus, you have not explained how the department has a litigation interest in information related to a potential lawsuit anticipated by the county. *See* Gov’t Code § 552.103(a); Open Records Decision No. 575 at 2 (1990).

You indicate that the department is raising section 552.103 on behalf of the county, the entity with the purported litigation interest. In this type of situation, we require an affirmative representation from the governmental body with the litigation interest that the governmental body wants the submitted information withheld from disclosure under section 552.103. As you acknowledge, the county has also received a request for information pertaining to the incident at issue, and you have included in your submission a copy of the county’s brief to this office raising section 552.103 as an exception to disclosure with respect to the request made to the county. Thus, we find you have shown that the governmental body with the litigation interest has raised section 552.103.

Upon review of the submitted information, however, we find the county has failed to demonstrate that any party has taken objective steps toward litigation beyond hiring an attorney who has made a request for information. Thus, we determine that the county has not established that litigation is reasonably anticipated. Accordingly, the department may not withhold the remaining submitted information under section 552.103.

We note that the submitted representative sample documents contain information that may be excepted from disclosure under section 552.1175 of the Government Code, which provides in part:

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<sup>2</sup>In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

(a) This section applies only to:

(1) peace officers as defined by Article 2.12, Code of Criminal Procedure; [and]

(2) county jailers as defined by Section 1701.001, Occupations Code.

(b) Information that relates to the home address, home telephone number, or social security number of an individual to whom this section applies, or that reveals whether the individual has family members is confidential and may not be disclosed to the public under this chapter if the individual to whom the information relates:

(1) chooses to restrict public access to the information; and

(2) notifies the governmental body of the individual's choice on a form provided by the governmental body, accompanied by evidence of the individual's status.

Gov't Code § 552.1175(a)-(b). We note that a post office box number is not a "home address" for purposes of section 552.1175. To the extent that the information that we have marked in the submitted representative sample documents relates to a peace officer or a county jailer who elects to restrict access to the information in accordance with section 552.1175(b), the information must be withheld under section 552.1175. Otherwise, the department must release this information to the requestor.

In summary, in the event the information we have marked in the submitted representative sample documents relates to a peace officer or a county jailer who elects to restrict access to the information in accordance with section 552.1175(b), the department must withhold the information under section 552.1175 of the Government Code. Otherwise, the department must release this information to the requestor. The remainder of the submitted information must be released to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within thirty calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within ten calendar days.

*Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within ten calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within ten calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Tex. Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within ten calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read 'D. Saldivar', with a long horizontal flourish extending to the right.

David R. Saldivar  
Assistant Attorney General  
Open Records Division

DRS/seg

Ref: ID# 211229

Enc: Submitted documents

c: Mr. Robert A. Brunig  
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(w/o enclosures)